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In the
Supreme Court of the United States

MICHAEL LONECKE, RAYMOND DUFFY, ANNE NELSON, ROBERT S. FASH, and CRAIG A. HARRIS, Individually and on behalf of all those similarly situated, and WILLIAM WOODWARD, Individually and on behalf of all those similarly situated,

Petitioner,

v.

CITIGROUP PENSION PLAN, PLANS ADMINISTRATION COMMITTEE OF CITIGROUP INC, CITIGROUP INC.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS

LEWIS CLAYTON
Counsel of Record
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
lclayton@paulweiss.com

MYRON D. RUMELD
RUSSELL L. HIRSCHHORN
PROSKAUER ROSE LLP
1585 Broadway
New York, NY 10036-8299
(212) 969-3021
Attorneys for Respondents.

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the fractional test for determining compliance with ERISA's minimum benefit accrual requirements is applied on a year-by-year basis or, as the plain language of the statute, 26 U.S.C. § 411(b)(1)(C), dictates, "upon . . . separation from the service"?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the Citigroup Pension Plan, the Plans Administration Committee of Citigroup Inc. and Citigroup Inc. state that they have no parent corporations. No publicly held corporation owns 10% or more of Citigroup Inc.'s stock.

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OPINIONS BELOW

The final opinion below is *Lonecke v. Citigroup Pension Plan*, 584 F.3d 457 (2d Cir. 2009). The decisions of the district court are *In re Citigroup Pension Plan ERISA Litig.*, 470 F. Supp. 2d 323 (S.D.N.Y. 2006), 241 F.R.D. 172 (S.D.N.Y 2006); No. 05-Civ-5296, 2007 U.S. Dist. LEXIS 27004 (S.D.N.Y. Apr. 4, 2007); and No. 05-Civ-5296, 2007 U.S. Dist. LEXIS 86145 (S.D.N.Y. Nov. 20, 2007).

COUNTERSTATEMENT OF THE CASE

Preliminary Statement

Petitioners ask this Court to grant review of a decision that correctly applied the plain language of the Employee Retirement Income Security Act ("ERISA") in a way that conflicts with no Supreme Court precedent and no decision in any other court. Indeed, perhaps because it arises from apparently unique features of the ERISA plan at issue, the question presented has never been *considered* in any other case, and is extremely unlikely to recur.

This case involves a Citigroup cash balance pension plan that includes a "top-up" provision, Article 4.1(e) of the Plan, that adds to a participant's benefits when necessary to ensure compliance with ERISA's minimum benefit accrual rules. Set out in ERISA section 204(b)(1)(A), (B) and (C), these rules establish three alternative minimum tests for the rate at which benefits accrue, in order to prevent "backloading" — a circumstance in which plans grant a disproportionate amount of pension credits to workers in their last years of employment. One of the permitted statutory tests is the "fractional test" of ERISA section 204(b)(1)(C). Article 4.1(e) of the Plan sets out a formula that tracks the statutory requirements and mandates that additional amounts be awarded, in satisfaction of the fractional test, if a participant's benefits at separation from service would otherwise not satisfy the minimum ac-

crual rules. In this way, Plan drafters guaranteed that ERISA's minimum accrual rules would be satisfied.

Petitioners' principal argument in the district court was that — contrary to the terms of the statute — no cash balance plan is permitted to use the fractional test to judge compliance with minimum benefit accrual rules. After persuading the district court of that erroneous proposition, Petitioners reversed field on appeal, conceding in the Second Circuit that the fractional test *is* available. The Court of Appeals properly held that the statute clearly permits application of the fractional test in a cash balance plan.

Instead of the central position they advanced in the district court, on appeal Petitioners emphasized a fallback argument. They claimed that the Citigroup Plan did not correctly apply the fractional test because it did not perform a fractional test calculation, and did not award additional sums in satisfaction of that test, each year for each participant. This position, however, is just as inconsistent with the terms of the statute as the argument Petitioners abandoned. Contrary to Petitioners' contentions, the statute states that a pension plan complies with the minimum benefit accrual rules "if the accrued benefit to which any participant is entitled *upon his separation from the service*" satisfies the fractional test. I.R.C. § 411(b)(1)(C); 26 U.S.C. § 411(b)(1)(C) (emphasis added). This wording is in clear contrast to the language used in describing another minimum benefit accrual test, which is to be applied each year. The Second Circuit, relying on this plain language, properly rejected Petitioners' argument.

Additionally, the question presented in this case is unlikely to recur and of little national importance.

We know of no other plan that uses the language at issue, language the district court called "unorthodox." And, as we discuss below, recent amendments to ERISA make it extremely unlikely that similar provisions will be considered in the future.

While Petitioners charge that Respondents wrongfully denied benefits to Plan participants, in fact, the opposite is true -- the terms of the Plan were drafted to make it absolutely certain that participants will receive everything to which they are entitled. As the Second Circuit noted, ERISA's minimum benefit accrual rules "are designed to prevent participants who leave their employment before normal retirement age from receiving benefits that are disproportionately low relative to the benefits they would have received if they had continued to work until normal retirement age *Lonecke v. Citigroup Pension Plan*, 584 F.3d 457, 469 (2d Cir. 2009) . Article 4.1(e) of the Plan ensures that this statutory purpose is served.

In short, Petitioners seek error correction where there is none, regarding a legal question of little national importance now or in the future. This Court should accordingly deny certiorari.

Procedural History

The unusual procedural history of this case reflects Petitioners' shifting legal position. Petitioners filed consolidated actions on behalf of themselves and a class of similarly situated individuals against Citigroup and its Plans Administration Committee, alleging that Citigroup's Plan violates ERISA. *In re Citigroup Pension Plan ERISA Litig.*, 470 F. Supp. 2d 323, 326 (S.D.N.Y. 2006) ("*Citigroup I*"). On December 12, 2006,

the district court denied Respondents' motion for summary judgment and granted Petitioners' motion for summary judgment in part. *Id.* at 327. The court held that the Plan violated ERISA's minimum benefit accrual rules, ERISA § 204(b)(1)(A)-(C); 29 U.S.C. § 1054(b)(1)(A)-(C). The court ruled that "the fractional rule may only be applied to participants with ten or fewer years of service," and that "the only applicable accrual test is the 133 1/3 rule," which the court concluded the Citigroup Plan violated. *Citigroup I*, 470 F. Supp. 2d at 337-38. On November 20, 2007, the district court issued a ruling directing Respondents to adjust the Plan formula in a manner that would bring it into compliance with the 133-1/3% minimum benefit accrual test. *In re Citigroup Pension Plan ERISA Litig.*, No. 05-cv-5296 (SAS), 2007 U.S. Dist. LEXIS 86145, at *8-9 (S.D.N.Y. Nov. 20, 2007). The court rejected Petitioners' arguments that further relief was appropriate on the backloading and notice claims. *Id.* [1]

Respondents promptly appealed. After Respondents filed their opening brief, however, Petitioners abandoned their argument that cash balance plans may not use the fractional test. Contradicting what they re-

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[1] The district court held, and Petitioners do not challenge here, that the Plan could be brought into compliance with ERISA by making adjustments so that it would satisfy the 133-1/3% test, *In re Citigroup Pension Plan ERISA Litig.*, 2007 U.S. Dist. LEXIS 86145, at *8-9, an adjustment of about $40 million or an average of less than $400 per Plan participant. Further, under equitable principles, any reformation of the Plan would take into account factors likely resulting in even smaller amounts. ERISA § 502(a)(1)(3); 29 U.S.C. § 1132(a)(1)(3). Petitioners vastly overstate the amount of money actually at issue per pensioner by relying on flawed and disputed hypotheticals. (Pet. at 19; Def. Br. Opp. S.J. at 4-5.)

peatedly told the district court on summary judgment and at the remedies phase, Petitioners' opening appellate brief announced that they "agree" with Respondents' argument "that the fractional rule can indeed be applied to Citigroup's Cash Balance Plan." (Pl. Br. at 33-34.) Petitioners even criticized the district court for committing reversible error by holding that the fractional test is inapplicable to the Plan — that is, for making the mistake of adopting Petitioners' central argument. (*See, e.g.*, Pl. Br. at 11.)

After convincing the district court to hold that the Plan was required to use the 133-1/3% test and only the 133-1/3% test, Petitioners asked the Second Circuit to order that the Plan *must* use the fractional test — not the fractional test provided for in the statute and regulations, but a special version of the test of Petitioners' own invention. Thus, Petitioners say that the fractional test must be applied (and a benefit adjustment made) every year, not just at separation from service. On October 19, 2009, the Second Circuit squarely rejected this argument, holding that "compliance with the fractional rule is tested 'upon [the employee's] separation from [the employer's] service.'" *Lonecke*, 584 F.3d at 468 (quoting I.R.C. § 411(b)(1)(C); 26 U.S.C. § 411(b)(1)(C) (alteration in original)). Petitioners unsuccessfully sought rehearing and rehearing en banc, though they did not raise in that petition whether the fractional test should be applied each year. This petition followed.

Factual Background

In 1999, Citigroup decided to include a cash balance pension plan in its menu of retirement benefits, which included (and still includes) a 401(k) plan and

other retirement programs. (*See* Joint App. at A-66, ¶ 15 and A-335, Ex. 4.) Cash balance plans are seen as having several benefits. They allow greater portability of benefits in a workplace where employees have increasing mobility and are considered easier to understand than traditional pension plans. *See Esden v. Bank of Boston*, 229 F.3d 154, 158 n.5 (2d Cir. 2000).

ERISA divides pension plans into two categories: defined benefit plans and defined contribution plans. Cash balance plans are defined benefit plans within the meaning of ERISA § 3(35), 29 U.S.C. § 1002(35), because they guarantee a prescribed level of retirement benefits. Benefits accrue, however, in a manner that resembles a defined contribution plan. The plan establishes a hypothetical account for each participant. Benefits are credited to the account each year based on a prescribed percentage of compensation, which may vary depending on the employee's age and/or years of service ("Benefit Credits"). Interest is also credited to the account, typically at a rate tied to an extrinsic index ("Interest Credits"). At retirement age, participants become entitled to a lump sum payout based on the accumulated value of their accounts, or to an actuarially equivalent pension. *See Esden*, 229 F.3d at 158.

Until the Plan was frozen on December 31, 2007, it annually awarded Benefit Credits to participants as a percentage of that year's total compensation. Under the Plan's formula, the percentage increased with age and years of service. Benefit Credits ranged from 2% for participants under age 25 in their first ten years of service to 7% for participants 50 years or older with 15 or more years of service. (*See* Joint App. at A-69, ¶ 24.) When the Plan was amended effective January 1, 2002, those percentages were reduced somewhat, ranging

from 1.5% for participants under age 29 in their first five years of service to 6% for those 55 or older with 15 or more years of service. (*See id.* at ¶ 25.) This amendment also brought new participants into the Plan (*see* Joint App. at A-68, ¶ 19), and for many of them the post-amendment formula was an improvement.

Interest Credits, which continue to accrue despite the freeze, vary in accordance with the 30-year Treasury rate. (*See* Joint App. at A-68, ¶ 22.) This is the same rate prescribed by the Internal Revenue Code for determining the present value of a participant's retirement benefits. *See* I.R.C. § 417(e), 26 U.S.C. § 417(e). When the Plan was designed, guidance from the Treasury Department recommended that cash balance plans use this floating rate to avert "whipsaw" — a potential violation of ERISA in which the present value of a participant's accrued benefit at retirement age exceeds the amount in the cash balance account. *See* I.R.S. Notice 96-8, 1996-1 C.B. 359.

Like all defined benefit plans, the Plan must comply with ERISA's minimum benefit accrual rules, designed to prohibit "backloaded" plans that award disproportionately higher benefit accruals for later years of service. Toward that end, ERISA section 204(b)(1)(A), (B) and (C) sets forth three alternative minimum benefit accrual tests, at least one of which must be satisfied by a plan. ERISA § 204(b)(1)(A)-(C); 29 U.S.C. § 1054(b)(1)(A)-(C).

The Plan is designed to comply with the minimum benefit accrual rules through the use of either of two of the three statutory tests: the 133-1/3% test or the fractional test. Under the 133-1/3% test, described in ERISA section 204(b)(1)(B), the rate of benefit ac-

crual in any particular year cannot be more than one-third greater than the rate in any prior year. The fractional test, set out in ERISA section 204(b)(1)(C), looks at whether a departing participant has accrued a benefit at least proportionate to his or her years of service. Under the test, the ratio of the benefit accrued at the time of separation from service to the total benefit that would have accrued if the participant had continued working until normal retirement age (65 for this Plan) must equal or exceed the ratio of the years of service worked compared to total years of service until normal retirement age.

In applying both tests, the benefit accrual includes Interest Credits projected out to normal retirement age. For that reason, a formula like that of the Plan that uses the floating interest rate recommended by the IRS may satisfy the 133-1/3% test in one year, but later fall out of compliance as interest rates change. The "top-up" provision of Article 4.1(e) was included in the Plan to ensure compliance with the minimum benefit accrual rules regardless of interest rate movements. Article 4.1(e) provides that if the Plan is not in full compliance with the 133-1/3% test, it will instead comply with the fractional test, by crediting to the account of departing participants an amount necessary to satisfy that test. (*See* Joint App. at A-79, ¶ 51.) Because the fractional test by its terms looks at benefits accrued at the time of separation from service, Article 4.1(e) adds to benefit accruals at that point if an adjustment is needed to comply with the fractional test. In effect, Article 4.1(e) writes the fractional test into the Plan, to guarantee compliance with the statute.

It is undisputed that, under the benefit formula and interest rates in effect in 2000 and 2001, the Plan

was in compliance with the 133-1/3% test so that Article 4.1(c) did not come into play. (*See id.* at ¶ 47.) The combination of the amended Plan's new formula and prevailing interest rates, however, brought the Plan potentially out of compliance with the 133-1/3% test beginning in 2002. (*See id.* at ¶ 48.) For the post-2001 period, therefore, application of Article 4.1(c) ensured that the Plan satisfied the minimum benefit accrual rules. (*See id.* at ¶ 49.)

REASONS FOR DENYING THE PETITION

The Second Circuit Applied the Plain Language of the Statute

As the Second Circuit properly recognized, "compliance with the fractional rule is tested upon [the employee's] separation from [the employer's] service, not . . . on a year-by-year basis." *Lonecke*, 584 F.3d at 468 (internal citations and quotation marks omitted) (alteration in original). Indeed, the statute expressly states that the fractional test is performed upon "separation from service." That language — as well as similar language in the regulations — disposes of Petitioners' claim that the fractional test must be performed each year.

Article 4.1(e) of the Plan provides that adjustments be made at separation from service for the simple reason that ERISA section 204(b)(1)(C), which sets out the fractional test, requires it. The statute states in relevant part: "A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which any participant is entitled *upon his separation from the service*" is in accord with the ratio computed under the test. ERISA § 204(b)(1)(C); 29 U.S.C. § 1054(b)(1)(C) (emphasis added). The only reasonable construction of the italicized language is to require application of the test when a participant separates from service, just as Article 4.1(e) mandates.

Significantly, this language does not appear in the statute's discussion of the 133-1/3% test in ERISA section 204(b)(1)(B), which tests compliance in "a particular plan year." ERISA § 204(b)(1)(B); 29 U.S.C. § 1054(b)(1)(B). By incorporating the statutory language — "separation from the service" — directly into its text, Article 4.1(e) is designed to guarantee that the minimum benefit accrual rules are satisfied. If the drafters of ERISA had meant for the fractional test to be applied in each year, they would have said so — rather than choosing language that distinguishes this test from the 133-1/3% test. The regulations echo the statute. Those concerning the fractional test focus on separation from service, while the 133-1/3% test regulations speak of particular years. *Compare* 26 C.F.R. § 1.411(b)-1(b)(2) (testing for compliance with 133-1/3% test in "a particular plan year") *with* 26 C.F.R. § 1.411(b)-1(b)(3) (testing compliance with fractional test based on when employee "separated from the service").

The statutory text and regulations —both of which look to the date of "separation from service" in applying the fractional test — are entirely consistent with the purpose of the rule. As this Court made clear in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 & n.6 (1981), "ERISA prescribes vesting and accrual schedules, assuring that employees obtain rights to at least portions of their normal pension benefits even if they leave their positions prior to retirement." *See also Lonecke*, 584 F.3d at 469. That, of course, is precisely what Article 4.1(e) of the Plan did: it ensured that employees who left their positions before the normal retirement age would not be disadvantaged in any way. Petitioners seek not the benefit intended by ERISA, but rather hope to obtain a windfall that is not

tethered to when an employee actually leaves his or her position.

Ignoring this purpose, Petitioners cite to legislative history that they say is "inconsistent" with the "separation of service" language. Petn. 14. Were that true (it is not), the statutory text nevertheless would control. *See, e.g., U.S. v. Clark*, 454 U.S. 555, 560 (1982) ("If the statutory language is clear, it is ordinarily conclusive."); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("Absent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive."). But, in any event, the language Petitioners cite is not inconsistent with the statute. To the contrary, it merely observes that the fractional test would be applied to "an employee's accrued benefit as of any applicable date," or "on the date in question" or "the date when the computation is being made." Petn. 23-24. The applicable date for the computation *is* at the time of separation from service. None of Petitioners' passages suggest that the computation must be made yearly.[2]

Petitioners also discuss at length whether the Plan may apply the 133-1/3% test in some years and the fractional test in others to the same Plan partici-

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[2] Nor do Petitioners advance their case by arguing that plan administrators are obligated to inform participants about their benefits once a year. The calculation required by the fractional test can be performed at any point in order to inform a participant of the benefit to be received if he or she separated from service at that time. *See* Rev. Rul. 2008-7, 2008-7 I.R.B. 419 (setting out illustration of how the "fractional rule benefit" can be determined "at a date").

pant. But Petitioners do not identify the issue as a question presented, and do not contend that there is any reason to grant the petition to address this question. And indeed, there is not.

First, the Second Circuit did not even address the issue. Petitioners assert that I.R.S. Revenue Ruling 2008-7 was "the sole basis" for the Court of Appeals' "contention that Citigroup may apply the 133-1/3 rule in some years and the fractional rule" in others. Petn. 14. However, the Court of Appeals did not address the question of whether a plan can apply different tests in different years *at all*. Rather, it correctly recognized that if the fractional test applies, the *only* requirement is that the accrual be appropriate at the time of separation. Because the fractional test need not be applied on a year-by-year basis, the Court of Appeals likely saw no need to reach the issue of whether a plan could apply one test in one year and a different test in the following year.

Moreover, Petitioners cite no case, and we are aware of none, holding that such a requirement exists. The explicit terms of the statute and the purpose of the fractional rule are satisfied if a plan meets its test at the time of separation from service, regardless of the accrual test previously used. Section 204 of ERISA sets out three alternative minimum benefit accrual tests. It does not state that a plan must choose one rule and is forever bound to it, as Petitioners contend. This Court should not import additional technical requirements into an already "enormously complex and detailed statute." *Varity Corp. v. Howe*, 516 U.S. 489, 516 (1996) (internal citations and quotation marks omitted). The fact that Congress did not include an exclusivity re-

quirement is a complete answer to Petitioners' argument.

As the Court of Appeals stated, "[t]he rate of benefit accrual during a participant's employment is unimportant under this test, as long as proportional benefits are paid at the time of departure." *Lonecke*, 584 F.3d at 469. Thus, the Court of Appeals observed that I.R.S. Revenue Ruling 2008-7, 2008-7 I.R.B. 419, is consistent with its conclusion that time of separation is the proper moment for application of the fractional test. The Revenue Ruling describes approvingly "an example in which it first tests the plan using the 133 1/3 percent method and finds it satisfied for some, but not for all, participants . . . [and] then applies the fractional rule to those participants for whom the plan did not satisfy the 133 1/3 test." *Lonecke*, 584 F.3d at 469 (citing 2008-7 I.R.B. 419). The Court of Appeals cited the Revenue Ruling in support of its holding that the fractional test is appropriately applied at the time of separation from service, consistent with the plain language of the statute and the purpose of the law to regulate benefit accrual at the time of separation, not on a periodic basis. *Id.*

In support of their argument, Petitioners cite to IRS Document 6390, an IRS publication created to explain a "Worksheet" used during review of retirement plans. Petitioners' argument fails on multiple levels. First, the Worksheet is *not* "an authoritative interpretation of the IRS' position on minimal accrual rates for defined benefit plans." Petn. 15 n.6. "The purpose of the Worksheet . . . and this explanation is to identify major problems in the area of *plan vesting*." I.R.S. Doc. 6390 at 1 (emphasis added). Further, even if the Worksheet were as Petitions contend, it would not be re-

motely "authoritative." Indeed it would be entitled to no deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). [3] And, if there were any question about the Worksheet, it would be conclusively resolved by the later Revenue Rule 2008-7– which is entitled to deference and explicitly endorses the use of alternative minimum accrual tests. [4]

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[3] *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law [] do not warrant *Chevron*-style deference"); *Boykin v. KeyCorp*, 521 F.3d 202, 208 (2d Cir. 2008); *De La Mota v. U.S. Dep't. of Educ.*, 412 F.3d 71, 79 (2d Cir. 2005); *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 163 (2d Cir. 2000). The only case we have found that considers the precedential weight of Document 6390, *McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund*, 153 F. Supp. 2d 268, 284-85 & n.26 (S.D.N.Y. 2001), *aff'd in part, rev'd in part and remanded*, 320 F.3d 151 (2d Cir. 2003), simply "assume[d]" that the document, like letters from the IRS to plaintiffs' counsel in that case, were of "little, if any," weight. In the cases Petitioners cite, the courts merely deferred to official notices issued to solicit comments, *see, e.g., Esden v. Bank of Boston*, 229 F.3d 154 (2d Cir. 2000), or followed IRS interpretations that were independently supported and thus deemed persuasive. *See Weil v. Ret. Plan Admin. Comm. of the Terson Co., Inc.*, 933 F.2d 106 (2d Cir. 1991); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007).

[4] It describes a hypothetical plan designed to satisfy the fractional test in certain years and, depending on future conditions, the 133-1/3% test in other years: "With respect to the possibility that compensation increases for any future year may result in a plan failing to satisfy the fractional rule for that year, provisions would be necessary . . . to ensure that the plan could instead satisfy the 133 1/3% rule for that year." Rev. Rul. 2008-7, 2008-7 I.R.B. 419, 2008 IRB LEXIS 78, at *44-45.

There Is No Contrary Law

Nor is there any law contrary to the Second Circuit's opinion. Petitioners cite three cases claiming that they "support the year-by-year application of the fractional rule." Petn. 22. These cases, which do no more than mention the fractional test in passing, stand for no such proposition.

Alessi in no sense contains a holding concerning the mechanics of the fractional test. The issue in *Alessi* was whether a plan's worker compensation offset provision violated ERISA's vesting and accrual requirements. In a footnote, the Court observed that the fractional test "is essentially a pro rata rule under which in any given year, the employee's accrued benefit is proportionate to the number of years of service as compared with the number of total years of service appropriate to the normal retirement age." *Alessi*, 451 U.S. at 514 n.9 (citing 29 U.S.C. § 1054(b)(1)(C)). That brief statement was not meant as an explanation — much less a holding — concerning the proper administration of the fractional rule.

The same is true for the other cases Petitioners cite. *Hoover v. Cumberland, Maryland Area Teamsters Pension Fund*, 756 F.2d 977 (3d Cir. 1985), considered a challenge to the reduction of accrued benefits under a defined benefit plan. In explaining how accrued benefits work, the Third Circuit stated that "[t]he plan must provide a formula under which each participant's actual accrued benefit under the plan can be determined in each plan year." *Id.* at 981. The Third Circuit made this statement in the process of establishing that the plan under consideration qualified as a defined benefit plan (and the plan under consideration did compute

benefits annually), *id.* at 981-82; the Circuit did not apply the fractional test at all, much less discuss its proper application.

Finally, Petitioners' reference to *DeVito v. Pension Plan of Local 819 I.B.T. Pension Fund*, 975 F. Supp. 258, 269 (S.D.N.Y. 1997), similarly fails. The district court there stated that the fractional rule "is satisfied if the accrued benefit as of a given participation year is not less than the following: Normal Retirement Benefit x (Actual Years of Participation/Years of Service from Entry to Normal Retirement Age)." *Id.* at 269. This is an accurate statement of the calculation — it just says nothing about when the calculation occurs.

Therefore, Petitioners fail to identify *any* contrary law — much less a significant division in the Circuits requiring this Court's intervention. *See* Sup. Ct. R. 10(a). Additionally, Petitioners cite no law contrary to the Second Circuit's analysis regarding Revenue Ruling 2008-7, and there is no divided authority or indeed any contrary authority at all.

This Is a Question of Little National Importance

Not only has no court ever considered the question presented, but, in all likelihood, no other court will ever have occasion to do so. By all accounts, the plan at issue in this case is, as the district court noted, "unorthodox." *Citigroup I*, 470 F. Supp. 2d at 337; *see also* Petn. 19. This case is thus bound by its unique facts. What is more, the Plan at issue here has been frozen, as described above. *See supra* p. 5. Thus, the decision will have only a marginal effect on this very plan going forward.

Also significantly, the reasons for a provision like Article 4.1(e) were effectively eliminated by the passage of the Pension Protection Act of 2006 ("PPA"), which applies to distributions made after August 17, 2006. *See* PPA § 701(e)(2); I.R.C. § 411(b)(5); 26 U.S.C. § 411(b)(5). Prior to the PPA, the drafters of cash balance plans were concerned with averting whipsaw. *See supra* p. 6. At the time the Citigroup cash balance plan came into existence, the prevailing advice from the IRS was that whipsaw could be avoided by using a floating interest rate tied to the 30-year Treasury bills, as this is the same rate used to determine the lump sum present value of retirement benefits. But the floating interest rate created the risk that the plan would not satisfy one of the backloading tests — the 133-1/3% test — when interest rates moved downward. *See Lonecke*, 584 F.3d at 465 (noting that floating interest rates must remain sufficiently high in order for the 133-1/3% test to be satisfied). Using a minimum interest rate might have secured compliance with the 133-1/3% test, but it also might have compromised the Plan's ability to use the IRS's safe-harbor rate to avoid whipsaw. Thus, Article 4.1(e) provided a backup way to resolve backloading issues without creating a risk of whipsaw by satisfying the fractional test.

The PPA now allows plans to include a "reasonable" minimum interest rate to avoid backloading without concern for the pre-PPA fear that using a minimum rate would generate whipsaw; the PPA has simply eliminated whipsaw. Thus, because the 133-1/3% test will be easier to comply with, there will be less need in the future to address backloading through other means, such the stand-by fractional test in Article 4.1(e). Therefore, the legal issue presented here is unlikely to recur.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

LEWIS CLAYTON
Counsel of Record
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

MYRON D. RUMELD
RUSSELL L. HIRSCHHORN
PROSKAUER ROSE LLP
1585 Broadway
New York, New York 10036-8299
(212) 969-3021

Attorneys for Respondents.